

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

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mailing*

77-1356

To be argued by
MARY MCGOWAN DAVIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1356

UNITED STATES OF AMERICA,

*B
P/S*
Appellee,

—against—

HERIBERTO C. HERNANDEZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

MARY MCGOWAN DAVIS,
Assistant United States Attorney,
(Of Counsel).

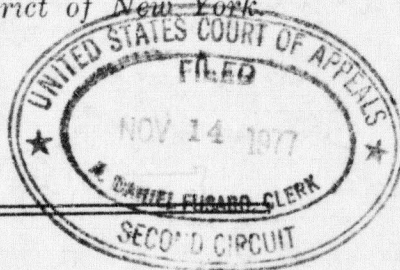


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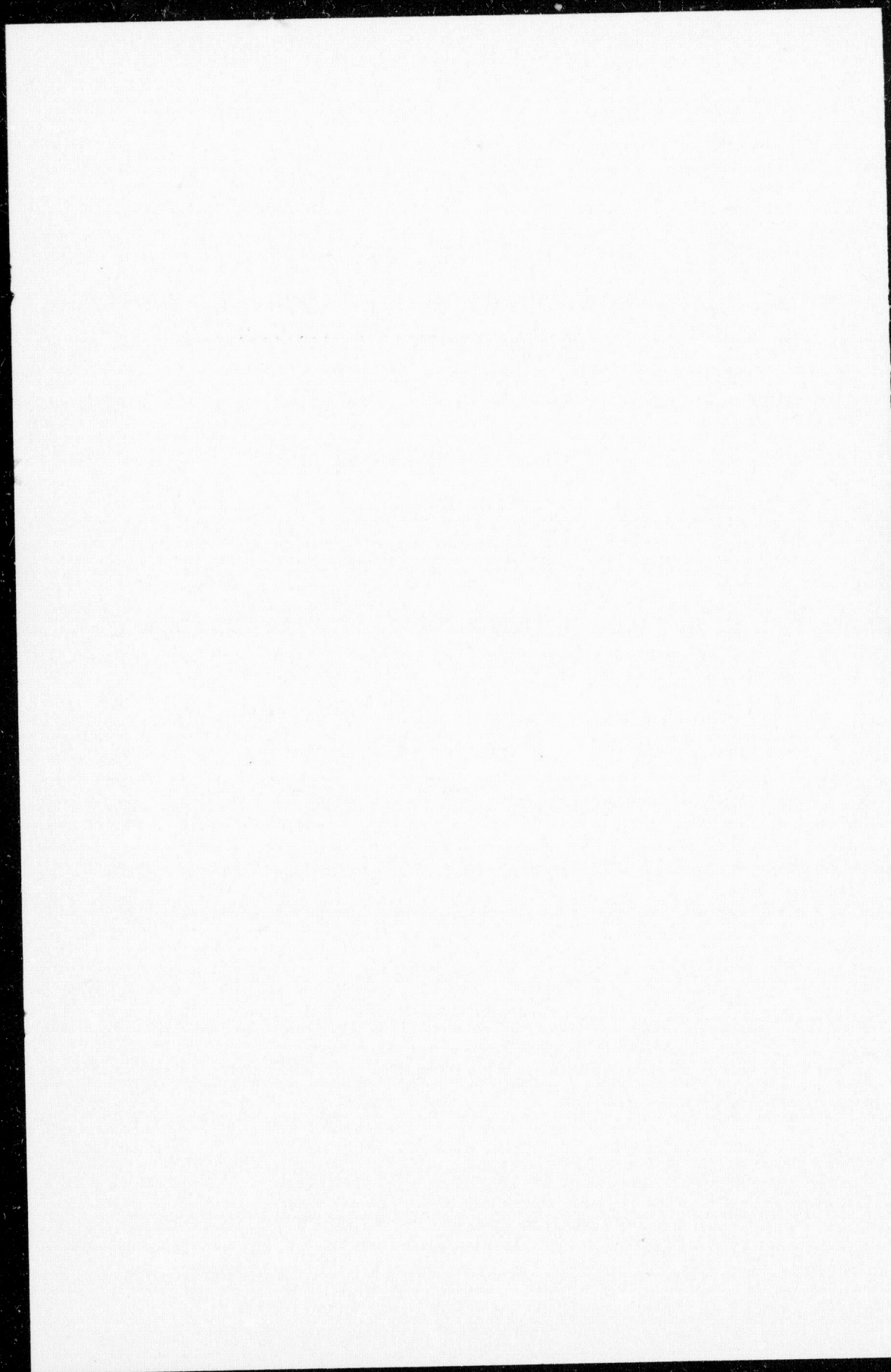
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1356

UNITED STATES OF AMERICA,

Appellee,

—against—

HERIBERTO C. HERNANDEZ,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Heriberto Hernandez appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York on August 15, 1977, after a one day trial before the Honorable John Bartels, United States District Judge, and a jury.

Indictment 72 CR 108, filed on January 27, 1972, charged Hernandez and his wife, Nydia Negron Hernandez, with a single count of possessing, with intent to distribute, approximately 122.2 grams of heroin, 54,068.8 micrograms of lysergic acid diethylamide (commonly known as L.S.D.), and 127.5 grams of cocaine, in violation of 21 United States Code, Section 841(a)(1). Both defendants moved to suppress the physical evidence seized at the time they were apprehended, and on August 14, 1973, an evidentiary hearing on these motions was conducted before Judge Bartels. The court denied the re-

requested relief, and trial was held on August 15, 1973. The jury found both defendants guilty as charged.

Following the verdict, defendant and his wife became fugitives, and a bench warrant was issued for their arrest on August 29, 1973. Heriberto Hernandez surrendered to the authorities on July 13, 1977, and on July 18, 1977, he was sentenced to three years in prison, to be followed by three years of special parole.

Statement of Facts

A. The testimony at the suppression hearing

At approximately 11:15 a.m. on January 13, 1972, John J. Walsh, Deputy United States Marshal in charge of the air piracy detail at LaGuardia Airport, responded to a telephone call from United Airlines personnel reporting that there were two "selectees" preparing to board Flight 429 to Cleveland, Ohio (Tr. 68-70).¹ The term "selectee" was used to designate those individuals whose "profile" suggested a substantial likelihood that they were potential hijackers and who thus were required to be interviewed by a United States Marshal before being cleared for boarding (Tr. 22-3, 31-5).² Walsh, accom-

¹ Numbers preceded by "Tr." refer to pages of the minutes of the suppression hearing and trial; "Br." refers to appellant's brief.

² The profile method of screening passengers was established by the Federal Aviation Administration in an effort to identify potential hijackers while there was still time to prevent them from embarking. In accordance with the anti-hijacking program in use at LaGuardia airport in January, 1972, a person had to meet all four of the profile criteria in order to be designated a selectee; once an individual's characteristics matched the profile, however, all of his traveling companions were automatically deemed to be selectees too, regardless of age or sex (Tr. 32-5). A selectee was asked to produce identification and if

[Footnote continued on following page]

panied by Deputy Marshal Richard McHale, hurried over to Gate 18, where he discovered "Mr. Mooney, who was the supervising agent [for United Airlines] . . . standing with the defendants by Gate 18, talking with them" (Tr. 72). A large sign behind the podium at Gate 18 warned the public, in English and Spanish, that the carrying of a concealed weapon aboard an aircraft is a crime and that passengers and baggage are subject to search under federal laws and regulations (Tr. 48-51, 61-3, 73).

Walsh's visual inspection of defendants and their ticket³ confirmed that Hernandez and his wife were properly designated as selectees (Tr. 75-82), and he accordingly asked them for some identification (Tr. 82-6). The defendants—who introduced themselves as Mr. and Mrs. Rivera—were unable to produce any identification (Tr. 82-6, 140-1), so they were advised by the supervising agent that "they would have to pass through the magnetometer . . . [i]n order that they may be cleared to board the flight" (Tr. 150-1). Since there was no magnetometer installed at Gate 18, Hernandez and his wife accompanied Mr. Mooney and the two marshals to the boarding area at Gate 15—some 150 feet away (Tr. 83-4). Prominent signs again advised in English and

it proved unsatisfactory, he was then invited to pass through a magnetometer if he wished to be cleared for boarding (Tr. 45-6). A positive reading on the magnetometer required the further step of submitting to a search of all carry-on bags and to a pat-down or limited frisk of one's person (Tr. 46-8). Prominent signs were posted at boarding areas warning all prospective passengers of their liability to such searches (Tr. 48-52).

³ The ticket was issued to five persons bearing the surname Rivera. Walsh testified that as he started to accompany the defendants to the magnetometer at Gate 15, he noticed the other members of the Rivera party—two children and a grandmother—waiting behind the podium at Gate 18 (Tr. 134-6). Had Mr. and Mrs. Hernandez been cleared to fly, the children and the grandmother would very likely have been asked to pass through the magnetometer too; however, "being that [the parents] were arrested, there was no point" (H. 137-8).

Spanish⁴ that passengers were subject to search of their person and carry-on luggage for weapons (Tr. 151-4), and the defendants were explicitly informed that the device "would detect any excess amount of metal they were carrying" (Tr. 150).

Hernandez passed through the magnetometer first and got a positive reading. His wife, who carried a pocketbook and a small flight bag, was then asked to proceed, and she too activated the machine (Tr. 89-92). Marshal Walsh informed Hernandez that "the only way we would clear him for the flight was to make sure he has nothing on him to go aboard the plane" and asked if he "would . . . consent to a physical pat-down" (Tr. 92-3). Defendant responded affirmatively and in the presence of Mr. Mooney, Marshal McHale and defendant's wife,⁵ Walsh "patted down" Hernandez and felt what appeared to be two cartridges in his right rear pocket (Tr. 95). Walsh asked Hernandez to remove these objects, and defendant "took them out and he says it's two .38 cartridges, two cartridges from a .38 pistol" (Tr. 96).

Marshal Walsh then turned to Mrs. Hernandez and asked if she would "consent" to a search of her two carry-on bags (Tr. 97). Defendant's wife responded, "[G]o ahead, here" (Tr. 98). Walsh first checked the contents of the flight bag, which contained only clothing, and then examined the pocketbook. The only articles in the pocketbook were a "purple blazer or blouse" and a "solid

⁴ Although both defendants were originally residents of Puerto Rico, each appeared to understand and speak English without difficulty (Tr. 83, 98-9, 101-2, 118-20).

⁵ After both defendants had passed through the magnetometer but prior to the pat-down and luggage search, Marshal Walsh closed the door into the jetway. This was standard procedure and was intended to "save [the defendants] the embarrassment of being frisked" should there be members of the public in the area and "also for our own security" (Tr. 143).

object [in a bag] on the bottom, four by [ten] in size, which I pulled out" (Tr. 100). Marshal Walsh inquired as to what was in this bag, and Mrs. Hernandez responded, "Medicine". Walsh proceeded to "ope[n] up the bag and at that point Mr. [Hernandez] jumped in and said, 'That's mine, it's cocaine and heroin'" (Tr. 100, 110).

The defendants were immediately arrested and advised of their rights (Tr. 101-2). At the Marshal's Office at Gate 31, Eastern Airlines, Hernandez produced identification showing his true name to be Heriberto Hernandez (Tr. 118-9). A field test performed on the contents of the bag reflected the presence of heroin, cocaine, and other drugs (Tr. 103), and a subsequent search of Hernandez's check-in baggage revealed one .38 automatic containing three live rounds of ammunition and a .22 pistol automatic (Tr. 116-7).

B. Judge Bartels' decision

The district court rejected the defendants' contention that in order to prove they voluntarily consented to the search, the Government must produce evidence that the couple was specifically advised they could avoid the search by electing not to board the airplane (Tr. 176-8). The court concluded that the Hernandezes were informed of the purpose of the magnetometer and that "they would have to be cleared in order to be permitted to board the plane" (Tr. 178). Judge Bartels noted that (1) there was no evidence of coercive tactics by the marshals or airline employees (Tr. 180); (2) that Mr. Hernandez was specifically asked if he would consent to a physical pat-down in order to clear himself for the flight and he agreed (Tr. 178-9); and (3) that his wife likewise was asked if she would mind if the marshals searched her bags and she replied, "Here, go ahead" (Tr. 179). Opining that "[o]bviously [the de-

endants] desired to take the chance of escaping detection, despite a search", the court ruled that the couple consented to the search "freely and voluntarily, and without coercion, implicit or otherwise" (Tr. 180).

C. The trial

The Government produced two witnesses—Marshal Walsh, who repeated his testimony given the previous day at the suppression hearing (Tr. 193-250), and Michael Grimes, an agent of the Drug Enforcement Administration, who gave evidence as to the retail value of the contraband seized from the defendants (Tr. 272-3). Grimes testified that the quantity of the contraband in evidence was too great to be purchased for one individual's personal use (Tr. 268, 271, 273-4).

The defense rested without offering any evidence.

ARGUMENT

POINT I

The search of Mrs. Hernandez's carry-on luggage was reasonable under the Fourth Amendment.

The sole question presented on this appeal is whether the search, prior to boarding an airplane, of his wife's carry-on luggage violated Hernandez's Fourth Amendment rights.⁶ Hernandez contends that the Government

⁶ The Government does not contest Hernandez's standing to challenge the search of his wife's pocketbook, since he was present at the time of the search and claimed a proprietary interest in the contraband seized. *Brown v. United States*, 411 U.S. 223 (1973). See also *Jones v. United States*, 362 U.S. 257 (1960).

abused its limited authority to search airplane passengers and their baggage for concealed weapons and that because no one could reasonably suppose that a man traveling with his family would hijack an airplane, the federal marshals were really looking for contraband. The record in no way supports defendant's effort to impugn the good faith of the authorities and instead, makes plain that the search of Hernandez and his wife strictly accorded with the procedures established by the Federal Aviation Administration to protect the public from airplane hijackers. This Court has identified at least three separate theories by which such warrantless searches are deemed reasonable under the Fourth Amendment, and the facts of this case support an analysis, and affirmance, under each.

A. The search was reasonable under the circumstances and the Hernandezes had fair warning of their liability to such a search.

In *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974), this Court adopted the view, first expressed by Judge Friendly in his concurring opinion in *United States v. Bell*, 464 F.2d 667, 675 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972),⁷ that warrantless searches of prospective airline passengers are reasonable under the Fourth Amendment so long as they are conducted in good faith for the purpose of preventing hijacking and the passenger has been given prior notice of his liability to such a search so that he can avoid it by electing another mode of travel. As the *Edwards* court recognized, "[w]hen the risk is the jeopardy to hundreds of human lives and

⁷ This view has not found favor with all members of this Court. See *United States v. Edwards*, *supra*, 498 F.2d at 501-2 (Oakes, J. concurring); *United States v. Bell*, *supra*, 464 F.2d at 675-6 (Mansfield, J. concurring).

millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness . . . ;" provided the Government does not abuse its authority or extend the scope of such searches beyond the purpose for which they are intended, an airport search will not be "condemned as violating the Fourth Amendment simply because it does not precisely fit into one of the previously recognized categories for dispensing with a search warrant." 498 F.2d at 498.

The instant record makes plain that the search of Mr. and Mrs. Hernandez complied strictly with the Federal Aviation Administration procedures in effect at LaGuardia Airport in January, 1972* and is devoid of any suggestion that the marshals were deliberately engaged in a hunt for contraband. After the defendants had been designated as selectees by the ticket agent—a designation that was visually confirmed by Marshal Walsh upon his arrival at Gate 18—and both failed to produce the requested identification, they were invited to pass through the magnetometer set up at Gate 15, a short distance away, "in order that they may be cleared to board the flight." (Tr. 150-1). Once they had both activated the magnetometer and a pat-down of Hernandez revealed two live .38 cartridges, the marshals were clearly justified in searching the couple's hand baggage—which was carried by Mrs. Hernandez—for further evidence of weapons. Walsh would have been derelict in his duty had he not inspected the "solid", "ten by [four]" inch contents of a bag he found in Mrs. Hernandez's

* In accordance with those regulations, all passengers who matched the profile of a potential hijacker and who failed to produce satisfactory identification were required to pass through a magnetometer prior to boarding the aircraft. If passage through the magnetometer activated the device, the passenger was then subjected to a limited frisk of his person and a search of all carry-

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purse and since "the search [was] proper, it is of no moment that the object found was not what the officer was looking for." *Abel v. United States*, 362 U.S. 217, 238 (1960).

Moreover, here, as in *Edwards*, the factual element of defendants' knowledge of their ability to withdraw prior to a search was clearly present. Cf. *United States v. Ruiz-Estrella*, 481 F.2d 723, 728-9 (2d Cir. 1973). Mr. and Mrs. Hernandez were specifically advised by Marshal Walsh that they would have to pass through the magnetometer and then, when the device activated, to submit to a search of personal belongings order to be cleared to board the flight. The clear implication of this repeated message was that if the defendants did not wish to embark on Flight 459 to Cleveland, they would not be searched. In addition to the marshals' verbal warnings, Walsh testified that on the date in question, prominent signs were posted at the ticket counter and at the boarding areas at Gates 18 and 15 announcing, in English and Spanish, that all "passengers and baggage are subject to search." Although the signs did not state "*in ipsissimis verbis*" that searches could be avoided by not proceeding to the designated areas,

... it would outrage common sense to suppose that an intelligent [person], neither blind nor deaf nor

on luggage for weapons. These procedures, which were designed to "swiftly sift out potential hijackers for closer scrutiny while permitting all passengers, including 'selectees', to board unless weapons are discovered," have been approved by courts in many circuits and have found favor with the public itself, which "generally welcome[s] the protective measures taken in their behalf rather than resent[s] them." *United States v. Lopez*, 328 F. Supp. 1077, 1092, 1097 (E.D.N.Y. 1971) (Weinstein, J.). See also *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973); *United States v. Mitchell*, 352 F. Supp. 38 (E.D.N.Y.), *aff'd*, 486 F.2d 1397 (2d Cir. 1972).

ignorant of the language, was not aware . . . 'that she was as free to step out of the line as the other passengers . . . if [that person] did not want [his or her] baggage to be searched.' *United States v. Edwards, supra*, at 501.

See also *United States v. Albarado*, 495 F.2d 799, 808 (2d Cir. 1974); *United States v. Davis, supra*, at 914. Mr. and Mrs. Hernandez, like defendant Edwards, "simply miscalculated the odds." 498 F.2d at 501.

Accordingly, because the good faith search of defendants and their luggage accorded strictly with the then current Federal Aviation Administration regulations aimed at minimizing the threat of airplane hijacking and because the Hernandezes were, or should have been, on notice that the search could have been avoided by choosing not to board the airplane, the search was clearly "reasonable" under the Fourth Amendment, and Hernandez's conviction should be affirmed.

B. Specific and articulable facts justified the search.

Although the federal marshals did not have probable cause to search the Hernandezes, the instant record reflects that here, as in *United States v. Bell, supra*, "specific and articulable facts exist[ed] to support a reasonably prudent man's belief that his or others' safety might be in danger," thus justifying the marshals' action under the rationale announced in *Terry v. Ohio*, 392 U.S. 1 (1968). *United States v. Clark*, 498 F.2d 535, 536 (2d Cir. 1974). See also *United States v. Skipwith, supra*; *United States v. Moreno*, 475 F.2d 44 (5th Cir.), cert. denied, 414 U.S. 840 (1973).

The ticket purchased by Hernandez marked him and all the members of his family as selectees—i.e., persons

whose profile suggested a substantial likelihood they were potential hijackers.⁹ Neither Mr. nor Mrs. Hernandez was able to produce identification when requested, and both triggered positive readings on the magnetometer when they passed through the device. These factors—singly and in combination—have been held to warrant the kind of limited pat-down and search of carry-on baggage that was required of the defendants in this case. See *United States v. Slocum*, 464 F.2d 1180 (3d Cir. 1972) (defendant met profile and activated magnetometer); *United States v. Epperson*, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972) (activation of magnetometer alone);¹⁰ *United States v. Lopez*, *supra* (defendant matched profile, registered positive on magnetometer, no identification). See also *United States v. Dalphiaz*, 494 F.2d 874 (6th Cir. 1974); *United States v. Fern*, 484 F.2d 666 (7th Cir. 1973); *United States v. Lindsey*, 451 F.2d 701 (3d Cir. 1971), *cert. denied*, 405 U.S. 995 (1972). As the district court observed in *United States v. Mitchell*, *supra*, 352 F. Supp. at 43,

[t]he profile and magnetometer except most passengers from the total search that common sense otherwise requires and that air safety really recom-

⁹ Hernandez contends that he and his wife were improperly designated as selectees because no one could reasonably suspect that a man traveling with his family would hijack an airplane. (Br. at 11-12). However, as this Court recognized in *United States v. Bell*, *supra*, at 674, individuals who hijack airplanes do not act according to normal expectations; "[t]housands of innocent passengers have been terrorized and their lives jeopardized by the venal, the political terrorist, and the mentally disturbed," who in the pursuit of imagined glory are indeed likely to smuggle weapons aboard an airplane concealed in the clothing of a wife or child. Moreover, it should be noted that the profile method of screening airline passengers has been upheld specifically because it is an *objective* test which allows no discretion on the part of airline or federal employees to single out passengers for inspection on the basis of subjective, possibly discriminatory criteria. See *United States v. Lopez*, *supra*, at 1101.

¹⁰ But see *United States v. Albarado*, *supra*, at 809 n.17.

mends, upon the calculation that if only those both within the profile, positive on the magnetometer, and unsatisfactorily responsive to interview are stopped and thoroughly searched, safe passage will be secured for all those boarding the flight.

Because the instant record supports the conclusion that the marshals reasonably believed the Hernandezes might be carrying weapons and thus posed a danger to themselves and to other passengers, the search was permissible under the exception to the warrant requirement enunciated in *Terry v. Ohio*, *supra*.

C. Hernandez and his wife consented to the search.

Finally, should this Court find that the warrantless search of defendant and his wife was not reasonable under either of the theories detailed above, the record makes clear that Mr. and Mrs. Hernandez freely and voluntarily consented to be searched prior to boarding the aircraft, thus curing any putative Fourth Amendment defect. Although the Government concededly bears the heavy burden of proving consent, examination of "the totality of all the surrounding circumstances," *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), supports the district judge's ruling that this burden has been overwhelmingly met in this case.

The Supreme Court emphasized in *Schneckloth* that the inquiry whether consent to a search has been voluntarily given necessarily focuses on the facts of a given case, with particular attention to establishing that compliance has not resulted from "coercion, express or implied." 412 U.S. at 249. The instant record is devoid of any suggestion of coercion and indicates instead that Judge Bartels correctly concluded that Hernandez and

his wife consciously elected "to take the chance of escaping detection, despite a search." (Tr. 180).

Here, as in *Schneckloth*, the prevailing atmosphere was "all very congenial." 412 U.S. at 220. Marshal Walsh and his colleague introduced themselves to the Hernandezes and politely informed them that since they were unable to produce any identification, they "would have to pass through the magnetometer . . . [i]n order that they may be cleared to board the flight." (Tr. 150-1). Since there was no magnetometer installed at Gate 18, they were asked to accompany the marshals and the United Airlines ticket agent, Mr. Mooney, to Gate 15—some 150 feet away—where the device was set up right inside the entrance to the jetway.¹¹ Prominent signs posted at both boarding areas advised that passengers and baggage were subject to search. The marshals and Mr. Mooney passed through the magnetometer first, and the defendants were explicitly told that the machine "would detect any excess amount of metal they were carrying." (Tr. 150). Once Hernandez had activated the device, he was informed that "the only way we could clear him for the flight was to make sure he has nothing on him to go aboard the plane." Hernandez was then asked if he "would . . . consent to a physical pat-down" and he responded, "Yes." (Tr. 92). Likewise, Mrs. Hernandez said, "Here, go ahead", when the marshals asked to examine her handbags. Cf. *United States v. Ruiz-Estrella*, *supra* at 727-8; *United States v. Meulner*, 351 F. Supp. 1284 (D.C. Cal. 1972).

¹¹ Although the door to the jet-way was closed after the couple had activated the magnetometer, the marshal explained that this was to save them the embarrassment of being frisked in view of the public and was also necessary "for our own security" in the event weapons should be discovered. Cf. *United States v. Kroll*, 481 F.2d 884, 887 (8th Cir. 1973); *United States v. Dalphiaz*, *supra*.

This synopsis of events makes plain that, as in *United States v. Edwards, supra*, there is simply no evidence that coercion was "either applied by the authorities or felt by the defendant[s]," both of whom apparently understood and spoke English without difficulty. 498 F.2d at 503. See also *United States v. Williams*, 516 F.2d 11 (2d Cir. 1975); *United States v. Crain*, 485 F.2d 297 (9th Cir. 1973); *United States v. Doran*, 482 F.2d 929 (9th Cir. 1973). Since Hernandez and his wife freely and voluntarily consented to these procedures when it was clear they could avoid them by electing to forego the flight, Hernandez may not now be heard to complain belatedly on appeal that he was deprived of any right under the Fourth Amendment.

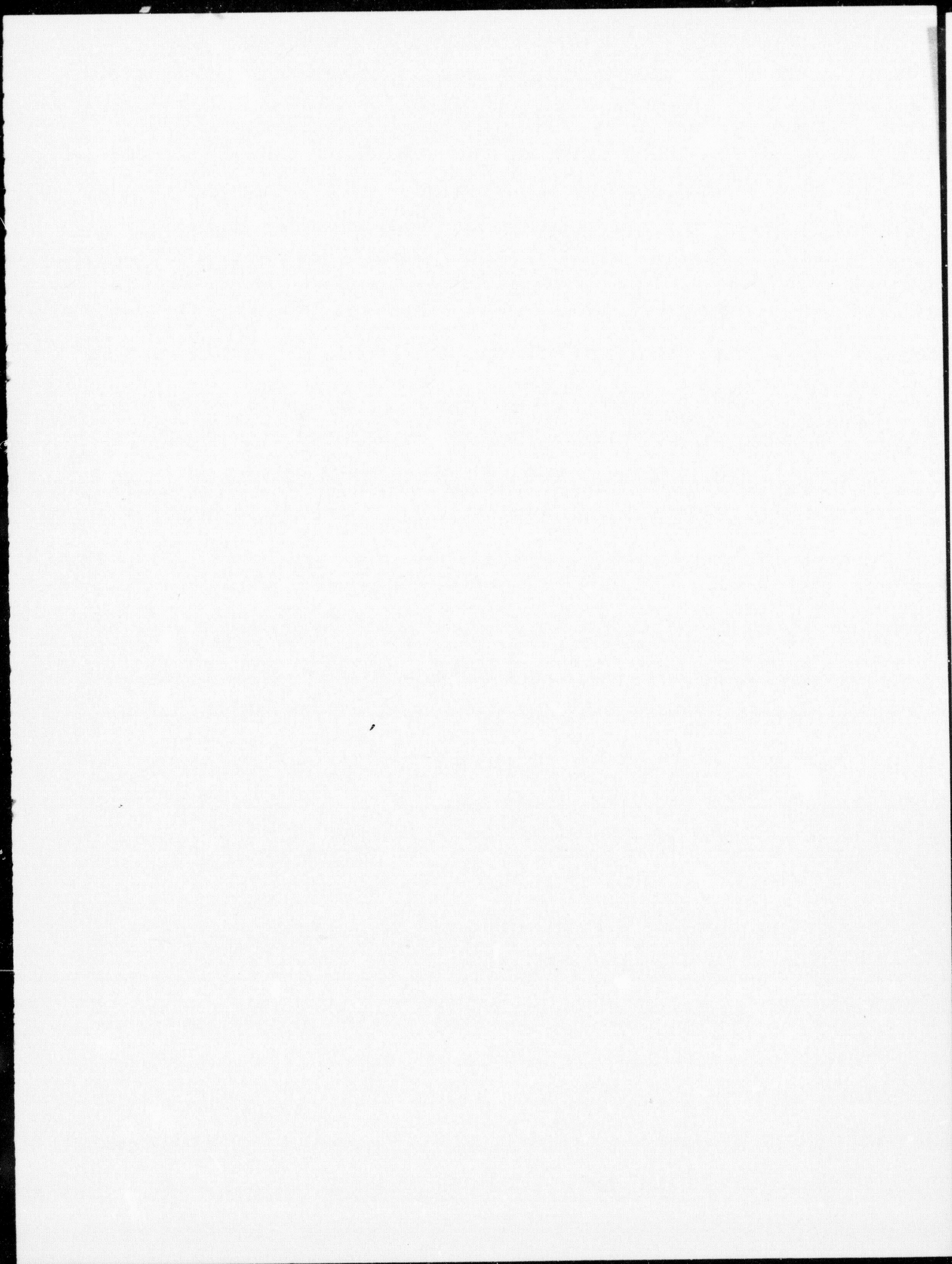
CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney for the
Eastern District of New York.*

MARY MCGOWAN DAVIS,
*Assistant United States Attorney,
(Of Counsel).*



AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 14th day of November 1977 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:
MICHAEL ASEN, ESQ., 217 BROADWAY, NEW YORK, NEW YORK 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Sworn to before me this

14th day of November 1977

Alvin J. Margen
Notary Public in and for the State of New York
Commission Expires March 30, 1979